

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E019 OF 2022

BETWEEN

LELAH BOMA.....APPELLANT

AND

**JOHN MUNENE KABUGUA.....1ST
RESPONDENT**

**DANIEL PIRI MWATATA.....2ND
RESPONDENT**

***(An appeal from the Judgment, and Orders of the
Environment and Land Court at Malindi (M. A. Odeny, J.)
delivered on 22nd March 2022***

in

Environment and Land Court Civil Appeal No. 1 of 2021)

JUDGMENT OF THE COURT

By a plaint dated 22nd December 2017 and amended on 31st October 2018, ***John Munene Kabugua, the 1st Respondent,*** filed a suit against ***Lelah Boma, the Appellant,*** and ***Daniel Piri Mwatata, the 2nd Respondent,*** jointly and severally seeking:

- a. Specific performance and in the alternative refund of the purchase price in the sum of Kshs, 750,000.

- b. Damages for breach of contract.
- c. Loss of income since June 2017,
- d. Vacant possession.
- e. Costs and interests at Court rates from 10th September, 2016 until payment in full.

In the suit, the 1st Respondent claimed that he had entered into a Sale Agreement on 19th September 2016 with the 2nd Respondent whereby he bought 7 rooms in a Swahili house (the house) situated at Mtomondoni area and that the agreement was witnessed by the 2nd Respondent's mother and another.

He claimed that, upon execution, he paid a deposit of Kshs. 400,000 and the balance of Kshs. 350,000 was paid in the sum of Kshs, 130,000, and a final amount of Kshs. 220,000 was paid on 10th April, 2017. He stated that the sale agreement provided that he was to start collecting rent from 6 rooms occupied by the tenants from May 2017; and that he went to the premises on the due date only to find that it was under renovation. Upon inquiry, he was informed that the Appellant had purchased the house. As he was unable to resolve the issue with the Appellant, on 28th June, 2017, he lodged a report at Mtwapa Police Station, but was advised to go to court instead. He stated that he was to collect

Kshs. 2,000 per room for 6 rooms, and Kshs. 3,000 from one other room totaling Kshs. 15,000 per month.

The 2nd Respondent did not enter appearance in consequence of which an interlocutory Judgment was entered against him.

On her part, the Appellant filed a defence in which she claimed that she entered into a Sale agreement with the sellers, James Mwangudza Mwatata and Nelly Mbodze Chuma, on 24th October, 2016. She claimed to have purchased 13 rooms in the house at the price of Kshs. 1.4 million and that, upon paying the purchase price, she was introduced to all the tenants, whereafter she started collecting rent. She stated that, towards the end of May 2017, one Eliza approached her and claimed ownership of the permanent house of seven (7) rooms, and that the matter was reported to Mtwapa Police Station, and that she was later sued.

Her case was supported by **Joseph Charo (DW2)**, a director of Baya Properties, who introduced the Appellant to the 2nd Respondent and later prepared and witnessed the sale agreement.

The trial magistrate, upon considering the suit, found that there was no dispute that a sale agreement existed between the 1st Respondent buyer and the 2nd Respondent seller dated 19th

September 2016 for the sale of a house at a consideration of Kshs. 750,000. The court found that the 1st Respondent had fully paid the purchase price in three instalments as evidenced by receipts produced in court.

The court also found that the same property was subsequently sold to a third party, the Appellant, by one James Mwatata, who also witnessed in the first transaction. The trial court held that the second agreement between the Appellant and Mwatata dated 24th October 2016 was unenforceable because Mwatata had no legal authority to resell the property after witnessing the earlier sale. Despite this finding, the trial magistrate went on to observe that, ordering specific performance in favour of the Appellant and compelling transfer of the house to the 1st Respondent would cause undue hardship to her as she was already in possession and had invested in the renovation of the rooms and collection of rent; that, although the Appellant's contract was void, she had nonetheless acted in good faith and would suffer prejudice if evicted. The trial magistrate reasoned that specific performance is an equitable remedy and therefore discretionary and to be granted only when justice demands. Consequently, the court ordered a refund of the purchase price of Kshs. 750,000, to the 1st Respondent together with general damages of Kshs. 500,000 instead of specific performance as prayed.

Regarding the rental income, the trial magistrate declined to

grant the rent related damages for the reason that, although the 1st Respondent had pleaded for Kshs. 15,000 per month, he had not specifically proved any loss with documentary evidence such as tenancy agreements, rent books, or receipts.

In conclusion, the trial court held that, while the 1st Respondent's claim was legitimate, the appropriate remedy was monetary compensation and not specific performance, given the presence of a third-party occupant and equitable considerations. In so holding, the court ordered a refund of Kshs. 750,000 together with interest thereon from the date of filing suit until payment in full; damages for breach of contract of Kshs. 500,000; Costs and interest. The 2nd Respondent would pay costs of the 1st Respondent.

Aggrieved, the 1st Respondent filed an appeal to the Environment and Land Court on the grounds that the trial magistrate: failed to appreciate that there was an interlocutory Judgment against the 2nd Respondent, and that the pending issue against the 1st Respondent was on assessment of damages; failed to grant an order of specific performance of the sale of a house without land at Mtomondoni, and in finding that the alternative prayer for refund was adequate; in award of the alternative prayer for refund despite appreciating that the 1st Respondent was entitled to orders of specific performance; failed to apply the principles of the Law of Contract; wrongly granted the house to the Appellant after correctly finding that the 2nd agreement

between the Appellant and James Mwatata and Nelly Chuma was unenforceable for want of capacity; failed to award loss of the rental income of Kshs. 15,000 to the 1st Respondent by the Appellant and 2nd Respondent from June, 2017 until payment in full; failed to

consider the 1st Respondent's written submissions; and was biased against the 1st Respondent.

The 1st appellate court, upon considering the appeal, held that the 1st Respondent had fully complied with his obligations under the sale agreement of 19th September 2016 having paid the entire purchase price; that the 2nd Respondent's failure to transfer the house and the subsequent sale to the Appellant was a clear breach of contract; that the trial court had acknowledged that the 1st Respondent's contract was valid, and that the Appellant's agreement was null and void. The court held that the trial magistrate was in error in declining to order specific performance solely on the basis of potential hardship to the Appellant, who stood to benefit from an unenforceable agreement. The court emphasized that once the trial court found the Appellant's title was defective, it was unjust to allow her to retain possession of the house.

The Court further held that the 1st Respondent was entitled to rental income of Kshs. 15,000 per month, which had been specifically pleaded and admitted by the Appellant; that the rental income constituted special damages and, in this case, it had been

clearly quantified and proved.

On the refund order, the 1st appellate court observed that the trial court having confirmed the validity of the 1st Respondent's contract went on to order a refund of the purchase price instead of enforcing the sale; and that this was

erroneous as it defeated the very essence of equitable relief and the sanctity of contracts. The court therefore found that the trial magistrate misdirected himself in declining to grant the primary relief of specific performance, and in allowing the Appellant to retain possession of property acquired under an invalid agreement.

Accordingly, the appeal was allowed and the trial court's Judgment set aside and, instead, judgment was entered for the 1st Respondent. The court issued an order of specific performance compelling transfer of the house to the 1st Respondent. The court further ordered the Appellant to vacate and deliver up possession of the house within 45 days of the Judgment, failing which an eviction notice would issue and, finally, the court awarded the 1st Respondent the rental income from June 2017 until vacant possession of the house was delivered up to him.

Aggrieved, the Appellant filed an appeal to this Court on grounds that the learned Judge: acted without jurisdiction in granting vacant possession which was not sought, and was contrary to the legal doctrine of unjust enrichment and contravened the Appellant's right to property under **Article 40**

and **50 (1)** of the Constitution; wrongly granted the prayer for specific performance when it was not available to the 1st Respondent, who had long acquired possession and given that the agreement in favour of the Appellant had been fully performed before

instituting the proceedings in the lower court; in allowing the 1st Respondent's

prayer for payment of rental income of Kshs 15,000 which amount was not due and payable to him.

The parties filed written submission which they highlighted briefly. When the appeal came up for hearing on a virtual platform, learned counsel **Mr. Mwangunya** appeared for the Appellant. Briefly highlighting the submissions, counsel submitted that the learned Judge granted vacant possession yet it had not been sought in the Memorandum of Appeal; that, by so doing, the court contravened the Appellant's right to property under **Article 40** of the **Constitution** since the 1st Respondent stood to gain 13 rooms whereas he only purchased 7 rooms. Counsel further submitted that, the Appellant's agreement having been performed, the remedy of specific performance was no longer available to the 1st Respondent.

On behalf of the 1st Respondent, learned counsel Mrs. Osina submitted that the court, in exercising its appellate jurisdiction, allowed the appeal after reevaluating the evidence and arriving at its own conclusion; that, in setting aside the alternative prayer for refund and allowing the prayer for specific performance of the sale agreement, the first appellate court rightly concluded that

the 1st Respondent was entitled to an order for specific performance and vacant possession having found, as did the trial court, that the Appellant was illegally in possession of the house as her agreement was found to be null, void and unenforceable.

It was also submitted that the Appellant did not acquire good title to the property as rightly held by the two courts below and that, therefore, she could not invoke the provisions of **Article 40** of the Constitution; that the Appellant did not refund any amount to any of the parties to the suit and that, therefore, the issue of unjust enrichment did not arise. Counsel further submitted that the learned Judge rightly ordered the release of the rent collected by the Appellant since both the trial court and the learned Judge had found that she was not entitled to the rent collected.

There was no appearance by the 2nd Respondent who is in person despite having been served with the hearing notice.

This being a second appeal, the mandate of this Court as a second appellate court is to resist the temptation of delving into matters of facts, and confine ourselves to matters of law only, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered, or upon finding that the entire decision was perverse. See the cases of ***Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR***; and ***Stanley N Muriithi & another vs Bernard Munene Ithiga [2016] eKLR***.

Upon consideration of the record, the grounds of appeal and the parties' submissions, the issues that fall for determination are:

- i) Whether the order for specific performance was properly granted;

- ii) Whether the Environment and Land Court acted without jurisdiction in granting vacant possession;
- iii) Whether the award of rental income was justified; and
- iv) Whether the 1st appellate court's judgment violated the Appellant's constitutional rights under Articles 40 and 50(1) of the Constitution.

On the order of specific performance, in the case of **Reliable Electrical**

Engineers Ltd vs Mantrac Kenya Ltd [2006] eKLR, Maraga, J. (as he then was)

held:

“Specific performance, like any other equitable remedy, is discretionary and will only be granted where the contract is valid and enforceable and its performance will not cause undue hardship.”

And in the case of **Manzoor vs Baram [2003] 2 EA**, it was also held that:

“Specific Performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the Plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.”

In the case of **Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998**, this Court held that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not

specific performance will do more perfect and complete justice than an award of damages.”

In this case, it is not in dispute that the 1st Respondent entered into a valid sale agreement with the 2nd Respondent and that he duly paid the entire purchase price as stipulated in the agreement. The trial magistrate, upon evaluating the evidence, found the contract to be valid and enforceable, a finding which was upheld by the 1st Appellate court, and which the Appellant has not controverted.

It was the 1st Respondent's unshaken evidence that he purchased the property with the intention of collecting rent from the rental units, only to discover that the property had been resold. The evidence is clear that the very purpose of purchasing the house was to acquire ownership and the attendant right to collect rental income as the landlord.

In these circumstances, the order for specific performance was the most appropriate remedy, and the learned Judge was justified in granting the equitable remedy of specific performance as it best served the interests of justice and ensured that the 1st Respondent enjoyed the full benefit of his acquisition.

On the order for vacant possession, and whether the court

had jurisdiction to grant it, the Environment and Land Court having been seized of an appeal against a decree involving land ownership and possession of an interest in land, was empowered to make such consequential orders as necessary, including an order of vacant possession so as to give effect to its judgment.

Vacant possession

is a consequential relief flowing from an order of specific performance, and was not an order in excess of the courts' jurisdiction. See ***Ngaira vs Cheng'oli [2022] KECA 80 (KLR)***.

Regarding the allegation of unjust enrichment and right to land ownership under **Article 40**, the 1st Respondent had purchased and fully paid for the house prior to the sale to the Appellant. Both the trial court and the 1st Appellate court found the sale to the appellant unlawful and unenforceable. By restoring possession of the house to the rightful purchaser did not constitute unjust enrichment, and given the facts, the question of unjust enrichment did not arise.

Concerning the rental income and special damages, the 1st Respondent pleaded for rental income of Kshs. 15,000 per month. Though the trial court declined to award rental income, the High Court granted the award after the Appellant admitted collecting rent notwithstanding that the 1st Respondent had entered into an earlier agreement in respect of the same house.

While special damages must be specifically pleaded and strictly proved, in this case the rental income was not speculative, and the collection of rent was admitted by the Appellant. We are

satisfied that the 1st appellate court rightly awarded the rental income to the 1st Respondent from June 2017 until the house was delivered up to him.

On the alleged violation of **Article 50(1)** of **the Constitution** and the right to be heard, the record shows that the Appellant was duly represented and given an opportunity to present her case before both the trial court and the Environment and Land Court. We find this issue to be unfounded.

In sum, the appeal has no merit and is hereby dismissed with costs to the 1st Respondent.

It is so ordered.

Dated and delivered at Mombasa this 30th day of January, 2026.

A. K. MURGOR

.....
..... **JUDGE**
OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

DEPUTY REGISTRAR

***I certify that
this is a True
copy of the
original***

Signed

